Supreme Court, U.S.
FILED
FEB 15 2002
OFFICE OF THE CLERK

No. 01-900

IN THE

Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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32 pp

QUESTION PRESENTED FOR REVIEW

Should this Court exercise its discretion to review a decision of the circuit court, which read the plain language of a federal statute pertaining to only the Hoopa Valley Tribe to find congressional authorization of the Tribe's exercise of limited jurisdiction within the Tribe's reservation over the timber harvesting activities of a nonmember of the Tribe?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	4
1. The Circuit Court's Decision Involves Routine Construction of a Statute Affecting One Indian Tribe in California.	4
2. The Circuit Court's Decision Presents No Conflict with the Decisions of this Court.	12
3. There Is No Conflict Between the Circuit Court's Decision and the Precedent Affirming Congress' Authority over Fee Lands in Indian Country.	20
Conclusion	22

TABLE OF CITED AUTHORITIES

Page

Cases:

Alaska v. Native Village of Venetie,
522 U.S. 520 (1998) 16

Antoine v. Washington,
420 U.S. 194 (1975) 6, 17

Arizona Public Service Co. v. U.S. EPA,
211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*,
121 S. Ct. 1600 (2001) 13

Atkinson Trading Co. v. Shirley,
532 U.S. 645, 121 S. Ct. 1825 (2001) 4, 20

Bailess v. Paukune,
344 U.S. 171 (1952) 21

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,
492 U.S. 408 (1989) 4, 19

Choate v. Trapp,
224 U.S. 665 (1912) 17

County of Yakima v. Yakima Nation,
502 U.S. 251 (1992) 17

Delaware Tribal Business Comm. v. Weeks,
430 U.S. 73 (1977) 21

Cited Authorities

Page

Donnelly v. United States,
228 U.S. 243 (1912) 19

Duro v. Reina,
495 U.S. 676 (1990) 13, 18

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 483 (1999) 4, 18

Healing v. Jones,
210 F. Supp. 125 (D. Ariz. 1962), *summarily aff'd*,
373 U.S. 758 (1963) 10

Heller, Ehrman, White & MacAuliffe v. Babbitt,
992 F.2d 360 (D.C. Cir. 1993) 12, 13

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 6

Karuk Tribe of California v. Ammon,
209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*,
121 S. Ct. 1402 (2001) 13

Levindale Lead & Zinc Mining Co. v. Coleman,
241 U.S. 432 (1916) 21

Mattz v. Arnett,
412 U.S. 504 (1973) 19

Cited Authorities

Page

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) 17

Montana v. United States, 450 U.S. 544 (1981) 4

Morris v. Hitchcock, 194 U.S. 384 (1904) 4

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 6

Nevada v. Hicks, 121 S. Ct. 2304 (2001) 18

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 14

Puzz v. United States, No. C80-2908-THE, 1988 WL 188462 (N.D. Cal. April 8, 1988) 7, 8, 9, 11, 12, 13

Rice v. Rehner, 463 U.S. 713 (1983) 14, 15

Seymour v. Superintendent, 368 U.S. 351 (1962) 18

Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992) 12

Cited Authorities

Page

Short v. United States,
486 F.2d 561, 202 Ct. Cl. 870 (1973), *cert. denied*,
416 U.S. 961 (1974) 8

Short v. United States,
661 F.2d 150 (Ct. Cl. 1981), *cert. denied*, 455 U.S.
1034 (1982) 8

Short v. United States,
719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*,
467 U.S. 1256 (1984) 8

Short v. United States,
12 Cl. Ct. 36 (1987) 8

Short v. United States,
25 Cl. Ct. 722 (1992) 8

Short v. United States,
28 Fed. Cl. 590 (1993) 8

Short v. United States,
50 F.3d 994 (Fed. Cir. 1995) 8

Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers,
531 U.S. 159 (2001) 19

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 16, 17

Cited Authorities

Page

Strate v. A-1 Contractors,
520 U.S. 438 (1997) 4, 7, 15

United States v. Celestine,
215 U.S. 278 (1909) 19

United States v. Enas,
255 F.3d 662 (9th Cir. 2001), *cert. denied*,
534 U.S. __, 70 U.S.L.W. 3463 (2002) 7, 15

United States v. Mazurie,
419 U.S. 544 (1975) 14

United States v. Mitchell,
445 U.S. 535 (1980) 20

United States v. Waller,
243 U.S. 452 (1917) 21

United States v. Wheeler,
435 U.S. 313 (1978) 14

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 19

Cited Authorities

Page

Constitutions:

U.S. Const. art. I, § 8 20

1972 Hoopa Constitution 4, 5, 7, 11, 12

art. III 5

art. IX, § 1(*l*) 5, 6

1996 Hoopa Constitution art. IX, § 1(k) 5

Statutes:

Act of June 28, 1898, 30 Stat. 495, ch. 517 17

Hoopa-Yurok Settlement Act of 1988, Pub. L. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. §§ 1300i-1 - 1300i-11 ..... 3, 4, 7, 9, 10, 11

16 U.S.C. § 470a(d) 17

16 U.S.C. § 470a(d)(2)(D)(iii) 21

18 U.S.C. § 1151 ..... 13, 14, 15, 16, 17

18 U.S.C. § 1154 .....14, 16

18 U.S.C. § 1156 16

Cited Authorities

Page

18 U.S.C. § 1161 ..... 14, 15

25 U.S.C. § 1214(b) 6, 7

25 U.S.C. § 1300i-7 ..... 4, 10, 12, 13

25 U.S.C. § 1301(2) 15

25 U.S.C. § 1903(4) 17

Other Authorities:

53 F. Reg. 49361 (Dec. 7, 1988) 11

H. Rep. 938, 100th Cong. 2d Sess. (1988) 7

S. Rep. No. 101-226, 101st Cong., 1st Sess. (1989) 7

R. Gressman, et al., *Supreme Court Practice* 202 (6th ed. 1986) 12

STATEMENT OF THE CASE

This case involves reading the plain language of the congressionally approved governing document of the Hoopa Valley Tribe and a section of a federal statute pertaining specifically to that document. Resolution of the cases below required no more than reading the straightforward language of these documents and applying an accepted analytical framework to determine whether Congress delegated a particular governmental authority to the Tribe. Petitioner Roberta Bugenig, who seeks to log her property in contravention of law, invites this Court to resolve a nonexistent conflict in the law and to fashion an unprecedented and legally baseless standard to test all delegations of congressional authority to Indian tribes. For the reasons discussed below, her petition should be denied.

1. In 1994, as part of the process to adopt a timber management plan, the Hoopa Valley Tribe commenced a lengthy public process to prevent timber harvests from adversely affecting the White Deerskin Dance Trail. *See* Pet. App. G-5; Pet. App. F-11. The White Deerskin Dance Trail is considered to be an archeological site by anthropologists, historians and the local community.[1] The history and cultural importance of the White Deerskin Dance is detailed in the tribal supreme court opinion. Pet. App. F-3-8.

2. The Tribe proposed a no-cut buffer zone one-half mile on each side of the Dance Trail. Pet. App. G-1; Pet. App. F-11; Pet. App. D-3. The cultural resource impact avoidance studies and public hearings conducted in 1994-95 included written notice to the few private landowners having property on Bald

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1. *E.g.*, Stipulated Tribal Court Record, Tab 15 (November 21, 1995, letter of HRIS researcher), filed in district court docket No. 21.

Hill, including Petitioner's predecessor-in-interest. Pet. App. G-5; Pet. App. F-11. Upon conclusion of the public notice and comment period, the Tribe adopted the plan, including the buffer zone, in January 1995. Pet. App. G-1; Pet. App. F-14; Pet. App. D-3. The plan was then approved by the Bureau of Indian Affairs. Pet. App. A-23; *see also* Pet. App. F-13, 15.

3. In March 1995, Petitioner Roberta Bugenig purchased property on Bald Hill. Pet. App. F-15; Pet. App. D-3. Petitioner's property is among the less than one-percent of the Hoopa Valley Indian Reservation that is owned by non-Indians. Pet. App. A-6; Pet. App. G-1; Pet. App. F-11. Bugenig contacted the Humboldt County Planning Department and the California Department of Forestry (CDF) asserting that she was exempt from state timber harvesting plan requirements because her proposed logging involved less than three acres. *See* Pet. App. G-2-3; Pet. App. D-3. Based on that representation, CDF issued her a less-than-three-acre exemption. *Id.* However, Bugenig had already entered into a contract to cut, deliver and sell to a lumber mill all of the timber on her land, as well as that of an adjoining parcel. Pet. App. G-2-4.[2] CDF later revoked Bugenig's exemption stating "no timber operations are allowed on significant historical or archeological sites [defined as] sites that have significant or religious importance to California Indians." Pet. App. G-6; Pet. App. F-16-17; Pet. App. D-4; Pet. App. A-11. Knowing that the Hoopa

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2. The tribal trial court specifically found that the volume of timber Bugenig proposed to sell had to be harvested from all of Bugenig's 40 acres. Pet. App. G-4 (". . . the court has determined that amounts of timber to be harvested as mentioned by the defendant, including conifers and hardwood[,] could not have been harvested from a 2.5 acre site" as Bugenig indicated in her application to CDF).

Valley Tribe owned the nearby road,[3] Bugenig attempted to establish a right-of-way to haul her harvested logs on the tribal road by writing a check to the Tribal Council. Pet. App. G-5-6; Pet. App. F-16; Pet. App. D-3. Two days later, Bugenig began to harvest the timber on her land. Pet. App. G-6; Pet. App. F-16; Pet. App. D-3. The Tribal Council refused the payment and ordered her to cease cutting down trees in the buffer zone designed to protect the archeological area. Pet. App. G-4; Pet. App. F-16; Pet. App. D-3-4.

4. When Bugenig continued to harvest timber, the Tribe filed suit against her in tribal court. Pet. App. G-4; Pet. App. F-16; Pet. App. D-4. The Tribe obtained an injunction that required Bugenig to halt her timber harvest and to restore the damaged area to its original condition. Pet. App. G-8. That injunction was affirmed by the Northwest Regional Appeals Court, which is the supreme court of the Hoopa Valley Tribe. Pet. App. F-24. Both tribal courts referred to Congress's approval of the tribe's authority. Pet. App. F-24; *see also* Pet. App. G-4. Petitioner then filed suit in the U.S. District Court for the Northern District of California, which upheld the Tribe's exercise of authority because it determined that Congress had delegated certain authorities to the Tribe in section 8 of the Hoopa-Yurok Settlement Act of 1988, Pub. L. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. §§ 1300i-1 through 1300i-11). Pet. App. D-9. Although a panel of the Ninth Circuit Court of Appeals reversed, Pet. App. C-26, upon rehearing, an

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3. Contrary to Petitioner's multiple misstatements, Pet. 1, 2, 3, the road adjacent to Bugenig's property is neither "public" nor a "highway, nor does the Dance Trail proceed "northward along a public highway." Pet. App. D-3. The hill is steep and wooded; a tribal road switchbacks up the hill. Stipulated Tribal Court Record, Tab 15 (three maps), filed in district court docket No. 21.

en banc panel of the Ninth Circuit affirmed the district court's decision. Pet. App. A-2. Petitioner then timely filed her petition for certiorari review by this Court.

REASONS FOR DENYING THE WRIT

1. The Circuit Court's Decision Involves Routine Construction of a Statute Affecting One Indian Tribe in California.

a. This Court has repeatedly said that where Congress has expressly authorized a tribe's exercise of civil authority over a nonmember, one need look no further to support the tribe's exercise of that authority. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1830 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 483, 483-84 (1999); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989); *Montana v. United States*, 450 U.S. 544, 564 (1981); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904). In this case, the Hoopa Valley Tribe received such congressional authority.

Section 8 of the Settlement Act states that the "existing [governing] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7. That section gave the Tribe's 1972 constitution, an "existing [governing] document," the express authorization of Congress.[4]

4. Petitioner excerpts the wrong governing document, the Hoopa Valley Tribe's constitution and bylaws as amended June 18, 1996. Pet. App. I. The relevant parts of the constitution and bylaws (Cont'd)

The language of the Tribe's 1972 constitution plainly authorizes the Tribal Council's enforcement of the Dance trail buffer zone. Article III of the 1972 constitution extends the "jurisdiction of the Hoopa Valley Tribe" to "all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order. . . ." HL 91.

Article IX § 1(*l*) of the Tribe's 1972 constitution enumerates the powers of the Tribal Council, one of which powers expressly includes the authority to regulate "non-members of the Hoopa Valley Tribe" under specified circumstances. However, that power is further subject to prior approval by the Commissioner of Indian Affairs. HL 92-93.

Bugenig exaggerates the scope of the circuit court's decision. Few of the governmental powers addressed in the 1972 constitution directly affect nonmembers. Moreover, the governmental powers are very specific and relate to only one Indian tribe. The circuit court thus properly concluded that the congressionally approved language of articles III and IX contemplates acts affecting nonmembers and plainly authorize the Hoopa Tribal Council to regulate private property to protect cultural and historical resources:

> Like art. III, art. IX(1)(*l*) is unambiguous. It states unequivocally that the Council can pass an ordinance that affects non-members and their lands, so long as the ordinance safeguards and

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(Cont'd)
ratified by Congress are set forth in the Hoopa Lodging, HL 91-94. Thus the brief of amicus curiae States of Idaho, *et al.*, quoting article IX, § 1(k), in Pet. App I-2, which purports to refer to enforcing conduct ordinances as to "nonmembers" of the Tribe is inaccurate; the ratified document omits that authority.

> promotes the peace, safety, morals, and general welfare of the Tribe and is approved by the Commissioner of Indian Affairs. An ordinance that is designed to protect a tribe's significant archeological and cultural resources "safeguard[s] and promote[s] the peace, safety, morals and general welfare" of the tribe. It is undisputed that the ordinance was approved by the Commissioner of Indian Affairs.

Pet. App. A-23. Although Bugenig asserts that article IX, § 1(*l*), refers only to consensual commercial dealings, Pet. 17, the language of article IX does not support that contention. Similarly, Bugenig's assertion that article IX refers only to *in personam* jurisdiction over nonmembers, Pet. 18, is not supported by the language of the article and places form over substance: The trees did not cut themselves. Moreover, this Court's precedent counsels that the tribal courts' understanding of such provisions should be accorded deference. *E.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

The statutory phrase "ratified and confirmed" is the same term of art Congress historically has used to give legal recognition to Indian agreements with the United States. *E.g.*, *Antoine v. Washington*, 420 U.S. 194, 200-04 (1975); *see also* Pet. App. A-18 (citing acts ratifying and confirming agreements with tribes). In short, the plain meaning of "ratified and confirmed" is to give every clause in the document being ratified the express authorization of Congress.[5]

5. When Congress acts as it did here, it does not necessarily federalize a tribe's governing document or authority. *See* 25 U.S.C. (Cont'd)

b. The legislative history of the Settlement Act confirms Congress' intent to address an acute problem by making a statutory delegation of authority to the Hoopa tribal governmental council.[6] The explanations in both the House and Senate reports on the Settlement Act confirm that the Act was intended as a statutory delegation of authority to manage all of the territory and inhabitants of the Reservation because of the need to remove impediments to governance by the Hoopa Valley Tribe mandated by the court in *Puzz v. United States*. Pet. App. A-25; F-24.[7]

(Cont'd)
§ 1214(b) (disclaiming codification of Alaskan tribe's constitution into federal law, but recognizing tribal status). This Court, describing the concept as "express authorization by federal statute," and "a different congressional direction," *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1987), clarified that "delegation" is not used in a technical sense. Accordingly, Congress did not necessarily confer federal power upon the Hoopa Valley Tribe. Instead Congress intended to do precisely what it said: It ratified and confirmed the expressly stated powers delineated in the 1972 Hoopa Constitution. Congress' authorization of the exercise of the Tribe's civil authority defined in its Constitution ensures the continued survival of those powers whether or not they are also inherent powers. *See United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), *cert. denied*, 534 U.S. __, 70 U.S.L.W. 3463 (2002).

6. The 1990 amendments to the Settlement Act show additional Hoopa tribal authority over matters affecting nonmember Indians, specifically preparation of the Settlement Roll and analysis of the "over 8,000 applications for the Settlement Roll." S. Rep. No. 101-226 at 15, 101st Cong., 1st Sess. (1989).

7. *See* Senate Report at HL 39 (statutory delegations to manage resources), 48 (territorial management powers), 27 (remove impediments to governance); H. Rep. 938 at 14 (management authority), 15 (statutory delegation), 18 (management of the reservation), 100th Cong. 2d Sess. (1988); witness testimony at HA 95-99.

In *Puzz v. United States*, Lillian Puzz and other individuals who did not qualify as Hoopa tribal members brought a suit to limit the governing authority of the Hoopa Valley Tribe and to compel creation of a reservation-wide tribal government representing the entire former Joint Reservation. Judge Henderson refused but ruled that the BIA had a duty to administer the Reservation and consult with all persons — tribal members or not — who could trace their ancestry to Indians connected with the Reservation at any time in the past. He did not define that group. *Puzz v. United States* (N.D. Cal. April 8, 1988), HL 1.

At the core of the *Puzz* decision is the recognition of the ongoing issue of the Hoopa Valley Tribe's governing authority over nonmembers. *Puzz v. United States* originated, Judge Henderson found, "because only one functioning tribal government was formed, on a reservation occupied by members of several distinct tribes and groups." Rejecting entitlement standards fashioned in the *Short* case,[8] the *Puzz* court mandated the BIA to reduce the Hoopa Valley Tribal Council to the role of an advisory body. The court emphasized that federal recognition of the Hoopa Valley Tribe with respect to the former Joint Reservation did not entail the power to control territory and manage resources of nonmembers, finding that "[t]ribes have these further powers

8. The multiple opinions in the *Short* litigation show that the Hoopa Valley Tribe's governmental authority over nonmembers has long been in issue. *E.g.*, 486 F.2d 561 (op. only), 202 Ct. Cl. 870 (op. and findings) (1973) (per curiam), *cert. denied*, 416 U.S. 961 (1974) ("*Short I*"); 661 F.2d 150 (Ct. Cl. 1981) (en banc), *cert. denied*, 455 U.S. 1034 (1982) ("*Short II*"); 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) ("*Short III*"); 12 Cl. Ct. 36 (1987) ("*Short IV*"); 25 Cl. Ct. 722 (1992) ("*Short V*"); 28 Fed. Cl. 590 (1993) ("*Short VI*"); 50 F.3d 994 (Fed. Cir. 1995) ("*Short VII*").

only when the government has conferred on them, by treaty or statute, a right of territorial management." HL 5.

The regulatory vacuum Judge Henderson's *Puzz* orders created was an administrative nightmare and provoked Congress into action. The Settlement Act was introduced on April 24, 1988, as H.R. 4469. Four hearings were held. House Serial Nos. 100-75, 100-77; Senate Hrg. 100-946, 100-949. *See* HL 95-99. The Senate version of the bill, substantially different from the bill introduced, became law on October 31, 1988, as Public Law 100-580, 102 Stat. 2924.

The Settlement Act divided the former Joint Reservation into two reservations, mooted the *Puzz* orders, expedited the *Short* litigation,[9] and enabled the Yurok Tribe to organize a tribal government on the Klamath River portion of the Reservation.

Sections 4 through 6 of the Settlement Act clarify the beneficiaries of the Hoopa Valley and Yurok Reservations assets. Section 4 established a Hoopa-Yurok Settlement Fund. Section 5 directed the BIA to create a Hoopa-Yurok Settlement Roll based on eligibility criteria established for Indians of the Reservation in *Short*. Section 6 established

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9. Because of BIA's disbursement of timber monies to only enrolled Hoopa tribal members in the 1950s, descendants of Indians who were not members of any tribe filed a breach of trust case in the Court of Claims in 1963. Plaintiffs in *Short v. United States* asserted they had ancestors who were allotted tracts of land on the Reservation, or, like Petitioner, that their ancestors had long lived in proximity to the Hoopa Valley Reservation. Accordingly, they claimed that they, too, should have received per capita payments although they were not Hoopa tribal members. The *Short* litigation, which spans almost forty years, includes seven major opinions; hundreds of unreported orders, and several related lawsuits. *See* note 8, *supra*.

three choices for persons qualified for the settlement roll: Hoopa tribal membership, Yurok tribal membership, or receipt of a lump sum payment. *See generally* HL 55-64.

The text of the Settlement Act demonstrates that it is a tightly integrated solution to a complex problem. *E.g.*, HA 44 ("The decisions [in *Short* and related cases] and *Puzz* . . . while perhaps correct on the peculiar facts and law, have had a very unhappy result.") Accordingly, the Act must be read as a whole, and Congress should not be held to a simplistic and rigid standard when it was trying to establish a broad and balanced settlement to a range of complicated problems. *See, e.g., Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *summarily aff'd*, 373 U.S. 758 (1963). For example, the ratification and confirmation of governing authority provided by section 8 became effective only if the Hoopa Valley Tribe, within 60 days after the enactment of Pub. L. 100-580, adopted and transmitted to the Secretary a resolution waiving certain claims and affirming assent, which resolution had to be determined valid and printed in the Federal Register. Pet. App. H-4. The Tribe enacted the required resolution, reciting that

> [t]he *Puzz* case has interpreted *Short* and applicable law in a manner which prohibits the Hoopa Valley Tribe from exercising territorial management powers over the Hoopa Square and has crippled the power of the Hoopa Valley Business Council to exercise the authorities granted under the Tribe's Constitution . . . to govern non-members and generally to safeguard and promote the peace, safety and general welfare of the Hoopa Valley Tribe.

53 F. Reg. 49361 (Dec. 7, 1988), HL 21-22. By complying with the resolution requirement, the Hoopa Valley Tribe assented to separation of the Square from Yurok reservation land, and the Hoopa Valley Tribe's authority to govern within the Square was affirmed. Hoopa nonmembers were not compelled to move from the Square, and many remain.

The Senate Report explains that Congress' understanding of the law governing the Square was that, absent a statutory delegation, the Hoopa tribal government could not manage the area. Pet. App. A-19 (citing S. Rep. at 9, HL 39). *See also* HL 27 ("The claims in [*Short* and collateral cases] have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property."); *id.* ("The authority of the Hoopa Valley Tribe to govern the Hoopa Valley Square and its interests in the assets of the Square will be confirmed."); *id.* ("This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square and establish and confirm its property interest in the Square.").

Yet Bugenig basically contends that Congress, which was spurred to action by the *Puzz* and *Short* orders — that necessarily involved the Hoopa Tribe's governmental authority over nonmembers — failed to address the need for a statutory delegation. Such a result is nonsensical and unsupported by the language and legislative history of the Settlement Act. Given Congress' broad authority over Indian affairs, it could have addressed this problem in a number of different ways. It chose to do so by confirming enumerated powers listed in the 1972 Hoopa Constitution only.

The meaning of the language of section 8 and the Hoopa constitution cannot be more clear. The ordinances of the Hoopa Valley Tribe in effect when the Settlement Act was before Congress expressly affected nonmembers.[10] The testimony of the witnesses in the hearings leading up to passage of the Settlement Act referred to such regulations. HL 95-96, 99. Certiorari is not warranted here.

2. The Circuit Court's Decision Presents No Conflict with the Decisions of this Court.

a. Conflicts in the law requiring this Court's resolution "must be both direct and apparent." R. Gressman, et al., *Supreme Court Practice* 202 (6th ed. 1986). Bugenig's strained misreading of this Court's decisions falls far short of this requirement. As the discussion above shows, the circuit court's decision is the result of a straightforward exercise of applying the plain language of a federal statute and a document incorporated by that statute. The specificity of the language of both provisions limits the effect of the decision below to one tribe in Northern California.

Section 8 of the Settlement Act is mentioned in previous decisions of the courts of appeals for the Ninth Circuit, District of Columbia, and Federal Circuit. *E.g.*, *Shermoen v. United States*, 982 F.2d 1312, 1316-20 (9th Cir. 1992) (*Puzz* case challenged right of Hoopa Valley Tribe to govern; relief sought would prevent Tribe from exercising sovereignty over the reservation allotted to them by Congress); *Heller*,

10. *See, e.g.*, HL 49 ("The intent of the legislation is to resolve a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent."); *see also* HL 100.

Ehrman, White & MacAuliffe v. Babbitt, 992 F.2d 360, 362 (D.C. Cir. 1993) (*Puzz* held that no single tribe had exclusive authority over any part of the reservation and ordered BIA to assume management; the Settlement Act overruled and mooted *Puzz*); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001) (denying that Settlement Act was a taking). None of these opinions conflicts with the circuit court's reading of section 8. Petitioner essentially concedes as much. Pet. 10.

To invite this Court's review of this unique case, Bugenig contends that the circuit court's decision conflicts with a "standard" established in another circuit. However, the purported standard is drawn solely from a dissenting opinion in *Arizona Public Service Co. v. U.S. EPA*, 211 F.3d 1280, 1302-03 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001), which provides no basis for the assertion that the circuit court's decision conflicts with decisions of this Court.

Moreover, Bugenig asserts that this unique case requires the Court to fashion a general standard for congressional delegations of authority with respect to Indian reservations. Bugenig contends that the standard should be, unless Congress expressly recites language from the Indian Country statute, 18 U.S.C. § 1151, and states precisely that the congressional authorization applies to *all* land in a reservation "notwithstanding the issuance of any patent," a presumption arises that Congress did not authorize tribal regulatory authority over non-Indians. Pet. 19-20.

As a threshold matter, Bugenig formulates the issue incorrectly. This Court's cases, such as *Duro v. Reina*, 495 U.S. 676 (1990), teach that the question is formulated as whether a tribe possesses jurisdiction over nonmembers,

not non-Indians. *See also United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

Bugenig then appears to argue that what Congress did in the Settlement Act is unusual or somehow flouts some presumption of a lack of authority over nonmembers on reservation land. *See* Pet. at 20. Yet Bugenig's own citation of numerous statutes undercuts her argument. *Id.* In fact, Bugenig's examples demonstrate that congressional authorization of tribal authority over lands within a tribe's reservation has become quite common.

Bugenig proceeds to misconstrue not only § 1151 but also this Court's cases on the subject. The language of § 1151 was not dispositive in either case Bugenig cites to support her position. *E.g.*, Pet. 20 (citing *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice v. Rehner*, 463 U.S. 713 (1983)). *Mazurie* focuses on a different statute, 18 U.S.C. § 1154, which exempts "fee-patented lands in non-Indian communities" within Indian reservations from the federal liquor laws.

The authorization of tribal authority noted in both *Mazurie* and *Rice* comes from a third statute, 18 U.S.C. § 1161, allowing tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law is not violated. Section 1161 exempts from federal prosecution acts "in conformity . . . with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register."

Congress used no specific words of delegation in § 1161. In that statute, Congress did not recite "we hereby delegate" or make any reference to "fee patented lands." Nevertheless this Court concluded that tribal liquor ordinances, duly adopted, certified by the Interior Department, and published in the Federal Register will have legal effect for federal criminal law purposes:

> It is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area. Early administrative practice and our prior decision in *United States v. Mazurie*, 419 U.S. 544 (1975), confirm this understanding of § 1161.

Rice v. Rehner, 463 U.S. 713, 728-29 (1983).

Section 1161 is not the only congressional authorization that undercuts Bugenig's purported standard. In *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1987), this Court noted that, in a statute that makes no reference to fee patent lands, "Congress provided for tribal criminal jurisdiction over nonmember Indians." 25 U.S.C. § 1301(2). *See also United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), *cert. denied*, 534 U.S. __, 70 U.S.L.W. 3463 (2002).

Bugenig's backward reasoning from § 1151 fails to show that the circuit court violated an interpretive rule or that Bugenig's purported standard has ever been adopted. The definition of Indian Country in 18 U.S.C. § 1151 embraces three areas: (a) Indian reservations; (b) dependent

Indian communities; and (c) Indian allotments.[11] The historical and revision notes on the 1948 Act, from which this section comes, notes that it consolidates numerous provisions into a concise statement of the applicable law. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998). Thus instead of this Court imposing an interpretive rule on Congress declaring that unless a statute recites that, within Indian reservations, it applies "notwithstanding the issuance of any fee patent, and, including rights-of-way" federal authority would not apply, in fact, the opposite is true: federal authority applies to all areas within an Indian reservation "except as otherwise provided."

b. Federal law presumptively governs all lands within an Indian reservation. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 526 n.1 (1998) (primary jurisdiction over Indian country rests with federal government and tribe). This presumption is illustrated by *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998):

> We must decide whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject

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11. The section states: "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of state, and "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

> to federal environmental regulations. If . . . the ceded lands no long constitute "Indian Country" as defined by 18 U.S.C. § 1151(a), [then] the State now has primary jurisdiction over them.

Id. at 333. *See also Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478-79 (1976) (refusing to ignore reservation status of fee lands).

While Bugenig notes that Congress has often cited the Indian Country definition in the context of tribal regulatory authority, Pet. 20, there are examples of congressional authorization of tribal authority over nonmembers that do not refer to the Indian Country definition. *E.g.*, 16 U.S.C. § 470a(d) (historic preservation programs); 25 U.S.C. § 1903(4) (child welfare); 25 U.S.C. §§ 450, *et seq.* (Indian self-determination); Act of June 28, 1898, 30 Stat. 495, ch. 517 (Curtis Act).

The Court has previously stated that the correct standard for interpreting an ambiguous congressional delegation is not to require use of "magic words" from § 1151 but rather:

> When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766.

County of Yakima v. Yakima Nation, 502 U.S. 251, 269 (1992); *see also Antoine v. Washington*, 420 U.S. 194, 199-200 (1975) (construing a series of ratifying statutes); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (involving a

ratifying statute). Thus Bugenig's effort to import the standards applicable to pre-statehood conveyances of lands beneath navigable waters, Pet. 19 n.15, is entirely inapposite.

By focusing on the geographic scope of the congressional authorization, Bugenig's proposed rule of construction, ignores the most common situation, a nonmember located on tribal property. *E.g.*, *Nevada v. Hicks*, 121 S. Ct. 2304 (2001); *Duro v. Reina*, 495 U.S. 676 (1990); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). Bugenig essentially argues that Indian reservations are dissolved to the extent that, under an allotment act, non-Indian settlers come upon it and purchase land.

This Court has directly and repeatedly rejected that contention. Most reservation land allotments are held by Indians. *Seymour v. Superintendent*, 368 U.S. 351 (1962), points out that:

> [T]he strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or non-existence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine . . . jurisdiction.

Id. at 357-58 (footnotes omitted).

This Court has explained, in a case concerning a portion of the Hoopa Valley Reservation, that Indian Country is not "confined to land formerly held by the Indians, and to which their title remains unextinguished, but includes all tracts 'lawfully set apart as an Indian reservation.'" *Donnelly v. United States*, 228 U.S. 243, 269 (1912). The strength of this principle was confirmed sixty years later, in another case concerning the Hoopa Valley Reservation, when this Court stated that "[A]ll tracts included with [a reservation] remain a part of the reservation until separated therefrom by Congress." *Mattz v. Arnett*, 412 U.S. 504, 505 (1973) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

c. Contrary to Bugenig's submission, the effect of congressional authorization of Hoopa tribal authority upon state authority is not presented here. Pet. App. A-27-28. Thus the reference to *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001), is inapposite to a factual context that does not address the possibility of state control over Bugenig's conduct. As the circuit court noted, when the facts became clear, California revoked Bugenig's exemption stating "no timber operations are allowed on significant historical or archeological sites [defined as] sites that have significant or religious importance to California Indians." Pet. App. A-11. The circuit court observed that the absence of state regulatory jurisdiction over land is not a necessary condition for federal or tribal regulatory jurisdiction over the same land and that this Court has noted that tribal and state jurisdiction are not mutually exclusive. App. A-28 (citing *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 440 n.3). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (preemption standards applicable to Indian Country).

3. There Is No Conflict Between the Circuit Court's Decision and the Precedent Affirming Congress' Authority over Fee Lands in Indian Country.

Just last term, this Court again noted Congress' plenary authority in Indian Country. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825 (2001). Thus, Bugenig's contention that Congress' authorizing tribal authority over fee lands belonging to nonmembers conflicts with decisions limiting Congress's authority over such lands is baseless. Pet. 24-30.

In *Atkinson* the Navajo Nation sought to impose a hotel occupancy tax on a non-Indian's trading post on non-Indian land within the reservation. The Court would not have said "For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty," *id.*, 121 S. Ct. at 1830, if Congress could not confer such powers upon a tribe by federal statute or treaty. The Court would not have reasoned that "[b]ecause Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute . . . the Navajo Nation [must] establish the existence of one of *Montana*'s exceptions," if in fact Congress had no such authority.

As noted above, this Court's recent cases make it very clear that Congress may authorize tribes to govern and in fact often has delegated authority to Indian tribal governments with respect to both the land and persons of nonmembers, including non-Indians. *E.g.*, Pet. 20.

The obligations of the United States to Indian tribes and the power of Congress to regulate commerce "with the Indian Tribes," U.S. Const. art. I, § 8, neither begins nor ends with the Allotment Act and the fee patent process. *See, e.g., United States v. Mitchell*, 445 U.S. 535 (1980) (trust established by

general allotment act does not furnish cause of action or damages). From several ancient cases, Bugenig derives the obvious conclusion that "once a patent is issued for an allotment the trust relationship between the federal government and the owner of the fee ends." Pet. 25-26 (citing *Levindale Lead & Zinc Mining Co. v. Coleman*, 241 U.S. 432, 438 (1916); *United States v. Waller*, 243 U.S. 452, 463 (1917); *Bailess v. Paukune*, 344 U.S. 171, 173 (1952)). But issuance of a fee patent is simply the act by which the United States ceases to hold a particular tract in trust for an individual Indian. The fee patent certainly does not end federal power to protect the surrounding tribal lands.

In a thorough discussion, the circuit court explained that Congress has plenary jurisdiction over Indian reservations, which it retains after allotment and may exercise so long as Congress's act is rationally related to the protection of Indians. Pet. App. A-29 (citing *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 86 (1977)).

Authorization to exercise tribal authority over nonmembers has become common. Petitioner herself cites a series of statutes by which Congress exercises authority over fee patented lands of Indian reservations with respect to criminal matters, highway safety, open dumps, surface mining, water and air. Pet. at 20. The National Historic Preservation Act, indicates that tribes may assume functions for preserving and protecting historic properties in a manner that conforms to the cultural setting of the tribal heritage preservation goals and objectives.[12] Nothing could be clearer

12. 16 U.S.C. § 470a(d)(2)(D)(iii) provides that tribes may assume functions of state historic preservation officers pursuant to plans approved by the Secretary of the Interior except that "with respect to properties neither owned by a member of the tribe nor (Cont'd)

than that Congress's authorization here of a tribal ordinance protecting tribal lands of cultural and historic significance is tied rationally to Congress's fulfillment of its unique obligation to Indians.

CONCLUSION

For the reasons stated above, respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(Cont'd)
held in trust by the Secretary for the benefit of the tribe, at the request of the owner thereof, the State Historic Preservation Officer in addition to the tribal preservation officer, may exercise the historic preservation responsibilities."